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Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. A-612

VELMA ROSE BIGHEART, surviving spouse of William Bigheart, Jr.,

Appellant,

VERSUS

JOHN PAPPAN, Superintendent of the Osage Indian Agency; JOHN SLATER, Field Solicitor of the Osage Indian Agency; RAYMOND L. SANFORD, Regional Solicitor of the Department of the Interior, and WALTER L. HICKEL, Secretary of the Interior,

Appellees,

and

PEARL HALL, TERRIL RAE BIGHEART, BRUCE W. GAMBILL, RANDY WILLIAM BIGHEART and MATTHEW KANE, JR.,

Intervenor-Appellees.

PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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I. INTRODUCTION

Section 3 of the Act of Congress of April 18, 1912, 37 Stat. 86 vests the probate courts of the State of Oklahoma with exclusive jurisdiction to probate the restricted estates of testate and intestate Osage Indian decedents while Sec-

tion 8 of such Act commits the devolution of estates of *testate* Osage decedents to Oklahoma law subject only to a proviso requiring approval of the wills of such decedents by the Secretary of the Interior as a condition to state court probate of such wills.

Section 8 of the Act of Congress of April 18, 1912 reads in pertinent part:

> "That any adult member of the Osage Tribe . . . not mentally incompetent . . . may dispose of . . . all of his estate . . . by will, in accordance with the laws of the State of Oklahoma: Provided, that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

Of such section of such Act this Court said in *LaMotte* v. *United States*, 41 S.Ct. 204, 254 U.S. 570, 65 L.Ed. 410, that:

> "This provision is broadly written, is in terms applicable to restricted lands and funds, and enables the Indian to dispose of all or any part of his estate by will, *in accordance with the state law*, if his will be approved by the Secretary." (Emphasis supplied.)

The laws of the State of Oklahoma include 84 Okla. Stat. 44 which reads in pertinent part that:

> ". . . no spouse shall bequeath or devise away from the other so much of the estate of the testator that the other spouse would receive less in value than would be obtained through succession by law. . . ."

Such laws also include 84 Okla. Stat. 213, the Oklahoma statute of succession, which is confined in its operation by its introduction which reads that:

> "When any person having title to any estate . . . dies without disposing of the estate by will, it descends and must be distributed in the following manner . . . ."

Petitioner urges that since her husband died testate she is excluded by the terms of 84 Okla. Stat. 213 from taking by inheritance a share of his estate so that if she is to take more than the Ten Dollars granted to her in the will she must take by force of 84 Okla. Stat. 44 a share of his estate not by means of but as measured by 84 Okla. Stat. 213.

The Government and Intervenors contend that Petitioner can take only the Ten Dollars given her in her husband's will unless she can prove that she is enrolled upon or is a blood descendant of an Indian enrolled upon a roll prepared by the Secretary of the Interior because Section 7 of the Act of Congress of 1925 provides in pertinent part that:

> "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe . . . any restricted lands, money, or mineral interests of the Osage Tribe . . ."

an amendment to such act defining Indians as those enrolled upon or descended from those enrolled upon Indian rolls prepared by the Interior Secretary.

Petitioner has previously argued that both the Act of 1912 and that of 1925 are unconstitutional. Such contention being unheard, she now urges that whether such Acts are or are not unconstitutional she is entitled to take by force of Oklahoma law. 84 Okla. Stat. 44, a share of her husband's estate not by means of but as measured by the statute of

inheritance of Oklahoma, 84 Okla. Stat. 213. That neither Petitioner nor any other person taking by reason of 84 Okla. Stat. 44 can take under 84 Okla. Stat. 213 is to be seen from the introduction of such latter statute which is set forth above.

In urging that since the Act of 1912 commits the devolution of property of testate Osage decedents to state law that she takes by reason of a statute of such law, 84 Okla. Stat. 44, Petitioner calls to the attention of this Court the fact that her contention is upheld by the settled rule of property of the State of Oklahoma spelled out by its highest court in *Soderstrom* v. *Bonner* (Okla. 1937), 71 P.2d 117, the law and facts of which are identical to those here involved, which rule is that set out by W. F. Semple, Oklahoma Land Titles Annotated, Thomas Publishing Company, 1952. at Section 708 where we read that:

> "The restrictions placed by state laws upon a testator as to the disinheritance of a spouse and children apply to an Osage will with the same force and effect as to any other citizen of the state."

That this Court, or any other court, should enter a decision herein proscribing the marital state-declared right of this Petitioner to share in the estate of her husband is almost beyond belief, yet the Government and the Intervenors have successfully challenged the Oklahoma rule before the lower court by contending that (1) Petitioner seeks to take by inheritance a share of her husband's estate by inheritance but is prevented from doing so by reason of Section 7 of the Act of 1925, (2) The Oklahoma Court overlooked Section 7 of the Act of 1924 in writing its opin-

ion in *Soderstrom, supra,* and (3) the decision in this case is ruled by *Blanset* v. *Cardin,* 256 U.S. 319, rather than *Blundell* v. *Wallace,* 267 U.S. 664.

II. PROPOSITIONS OF THE PETITIONER

A. PETITIONER SEEKS TO TAKE A SHARE OF HER HUSBAND'S ESTATE BY FORCE OF 84 OKLA. STAT. 44 RATHER THAN BY INHERITANCE AND AS MEASURED BY RATHER THAN BY MEANS OF 84 OKLA. STAT. 213, THE OKLAHOMA STATUTE OF SUCCESSION.

While denying the constitutionality of the Acts of 1912 and 1925, Petitioner alleges that if such acts are constitutional a determination of the right of Petitioner to participate in the distribution of the estate of her husband requires a consideration of such acts in conjunction with 84 Okla. Stat. 44 and 84 Okla. Stat. 213.

Petitioner first urges that the Acts of 1912 and 1925 create separate, unrelated schemes for the testate and intestate devolution of the property of the decedent and since such statutes are not related by subject matter or internal reference and are not germane that neither scheme of distribution has any effect upon the other. Thus, should this Court hold that under 84 Okla. Stat. 44 the Petitioner takes by inheritance a share of her husband's estate Petitioner contends that the Act of 1925 is not applicable for it does not pertain to inheritance in the case of testacy by force of law, but refers to ordinary intestacy only. Thus, Petitioner contends, where the Secretary of the Interior has approved the will of a proscribed, deceased Osage Indian testator the scheme of Oklahoma law pertaining to testate devolution takes control of the distribution of the testator's prop-

erty and such property passes then by force of the testator's will dispositions plus those provisions engrafted upon such will by force of Oklahoma law and not by inheritance as such term is employed in the 1925 Act. Had this not been the intent of the Congress it is to be presumed that the Congress would have made specific reference in the Act of 1925 to state statutes governing the disposition of estates of *testators* rather than to a state of intestacy, which is the antithesis of testacy and which forms the sole subject of such latter act.

Petitioner next urges that she does not seek to take by inheritance and that the provisions of Oklahoma law prevent all persons similarly situated from seeking to take by inheritance for under the terms of the Oklahoma statute of succession inheritance follows only in those cases where a person:

> ". . . having title to any estate . . . dies *without* disposing of the estate by will. . . ." (Emphasis supplied.)

Any joint consideration of 84 Okla. Stat. 44 and 84 Okla. Stat. 213 must lead to the same result. One taking under the provisions of 84 Okla. Stat. 44 cannot take under the provisions of 84 Okla. Stat. 213 for 84 Okla. Stat. 44 becomes operative only in cases of testacy and not intestacy and where it becomes operative 84 Okla. Stat. 213 becomes inoperative. The intent of the Oklahoma Legislature thus appears to be that one who takes under and by reason of 84 Okla. Stat. 44 takes by force of that statute and not by inheritance a share of his deceased spouse's estate measured by rather than by means of 84 Okla. Stat. 213.

Statutes such as 84 Okla. Stat. 44 are found in other jurisdictions. That such statutes are considered a part of the law of wills rather than inheritance appears from *Irving Trust* v. *Day*, 314 U.S. 398, 86 L.Ed. 452, where this Court described the character of a statute similar to 84 Okla. Stat. 44 by saying that:

> "The condition clearly was such as New York might without restraint from the Federal Constitution annex to the privilege of making a will under its law.
>
> "Its effect was to continue as obligations of his estate social responsibilities which he had assumed during life. . . ."

In re Greenberg, 184 N.E. 784, 87 A.L.R. 833, spoke of New York's 84 Okla. Stat. 44 analogue by saying:

> "The inconsistency in our old law which compelled a man to support his wife during his life and permitted him to cut her off with a dollar at his death, has given way to a new public policy which no longer permits a testator to dispose of his property as he pleases.
>
> "The new law provides against and prevents unjust provisions, cutting off the widow from her share of the estate, but it does not leave open the question whether the wife has offended her lord and master. It makes no rule for the individual case. Proper provision must be made for the widow where the statute is applicable."

In *Labine* v. *Vincent*, 401 U.S. 532, 28 L.Ed.2d 288, 91 S.Ct. 1017, this Court held that under a similar Louisiana statute:

> "The people of Louisiana, through their legislature have carefully regulated many of the property rights

incident to family life. Louisiana law prescribes certain formalities requisite to the contracting of marriage. Once marriage is contracted there, husbands have obligations to their wives. Fathers have obligations to their children. . . . To further strengthen and preserve family ties, Louisiana regulates the disposition of property upon the death of a family man. *The surviving spouse is entitled to an interest in the deceased spouse's estate.* Legitimate children have a right of forced heirship in their father's estate. . . .

". . . the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The federal constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules.

". . . the power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature, not the life-tenured judges of this Court, to select from among possible laws." (Emphasis supplied.)

Apropos of the approval of this Court of the philosophy upon which 84 Okla. Stat. 44 is based is the concurring opinion of Mr. Justice Douglas, joined in by Mr. Justice Black, which appears in *Marie De Sylva* v. *Marie Ballentine*, 351 U.S. 570, 76 S.Ct. 974, 100 L.Ed. 1415, where the issue considered was that of whether under Section 24 of the Copyright Act of 1947 providing a right of renewal upon the author's death to his "widow, widower, or children" the author's legitimated but not adopted illegitimate

child shared as a member of such class in such right of renewal, *etc.* This Court held that the right of renewal was created by federal law but that the class should be determined by state law since such law, rather than federal law, defined familial relationships.

Of the Copyright Act, Mr. Justice Douglas said, in words appropriate to 84 Okla. Stat. 44, that:

> "There is no right of inheritance involved here. It is a statute that confers recovery upon dependents, not for the benefit of an estate, but for those who by our standards are legally or morally entitled to support. Humane considerations and the realization that children are such no matter what their origin alone might compel us to the construction that, under present day conditions, our social attitude warrants a conclusion different from that of the early English view. *The purpose and effect of the statute is to continue the support of dependents after a casualty.* To hold that these children or the parents do not come within the terms of the act would be to defeat the purposes of the act. *The benefit conferred beyond being for such beneficiaries is for society's welfare in making provision for the support of those who might otherwise become dependent.*" (Emphasis supplied.)

Thus, despite the inability of the child to inherit from its father, the Court held that the child received a right under the statute not by inheritance but by force of the Act which Act had been designed for the moral purpose of providing by force of law for the right of a dependent of the deceased.

B. THE OPINION HANDED DOWN BY THE HIGHEST COURT OF THE STATE OF OKLAHOMA IN THE CASE OF SODERSTROM v. BONNER (OKLA. 1937), 71 P.2d 117, IS DECISIONALLY IDENTICAL IN FACTS AND LAW OF THE PRESENT CASE. SUCH OPINION IS BASED UPON 84 OKLA. STAT. 44, A PART OF THE LAWS OF THE STATE OF OKLAHOMA TO WHICH THE DEVOLUTION OF THE RESTRICTED PROPERTY OF THE DECEASED OSAGE TESTATORS IS EXCLUSIVELY COMMITTED BY SECTION 8 OF THE ACT OF CONGRESS OF APRIL 18, 1912, 37 STAT. 86, UPON APPROVAL OF SUCH WILLS BY THE SECRETARY OF THE INTERIOR. SUCH OPINION HAS BECOME A RULE OF PROPERTY AND SHOULD BE HELD TO GOVERN THE DECISION TO BE MADE HEREIN.

Soderstrom, supra, is a part of a group of three Oklahoma cases which form a rule of property, of the State of Oklahoma and which hold that Section 8 of the Act of Congress of April 18, 1912, 37 Stat. 86, commits the testate devolution of property of deceased Osage Indian testators to the laws of the State of Oklahoma pertaining to wills and the disposition of property of deceased testators to those members of his family or relatives provided for in such laws.

The first of such cases was handed down by the Oklahoma Court in 1936 in the case of *In re Revard's Estate*, 63 P.2d 973, where the Oklahoma Supreme Court considered the claim of a pretermitted child of a deceased, restricted Osage Indian testator and stated in its fourth headnote that:

> "By Section 8 of the Act of Congress of April 18, 1912 (37 Stat. 86, 88), a competent Osage Indian may dispose of his Osage headright by will, but in doing so he is bound by the general laws pertaining

to wills in Oklahoma, and the disposition to those members of his family or relatives or intentional omission thereof, which are set up in said laws."

At page 976 of the same opinion the Oklahoma Supreme Court said:

". . . Congress, in permitting Osage Indians of a certain class to dispose of this class of property by will, has attached the limitation thereon that such disposition shall be in accordance with the laws of the state of Oklahoma."

The Oklahoma Supreme Court then followed the reasoning of this Court in *Blundell* v. *Wallace*, 220 Pac. 40, 267 U.S. 664, *infra*, by saying that:

"In legislating concerning the testamentary disposition of property by restricted Indians, or the testamentary disposition of restricted property by competent Indians, Congress has frequently imposed certain limitations insuring that his family, or certain members thereof, or certain named close relatives, shall not be omitted. Sometimes, as in section 23 of the Act of Congress of April 26, 1906 (34 Stat. 145), those persons who must be remembered are named. In other acts they are not named, but it is apparent that Congress has adopted the law of wills as it exists in the state where the Indian usually resides. We are of the opinion that there can be little doubt but that Congress in enacting section 8 of the Act of Congress of April 18, 1912 (37 Stat. 86, 88), intended to adopt the general scheme of the statutes of Oklahoma pertaining to wills. . . .

"Paraphrasing the language of the above section, insofar as it pertains to the present question, Congress has thereby said that a competent Osage Indian

> may dispose of his personal property by will, 'in accordance with the laws of the State of Oklahoma.' . . . We cannot help but conclude, therefore, that Congress had in mind the requirements contained in our statutes on wills when it adopted the above act."

While *Revard, supra,* involved the right of a pretermitted child to take a share of his father's estate in the absence of a will making provision for him, *Soderstrom* v. *Bonner,* 71 P.2d 117, which followed *Revard,* involved the right of a surviving spouse of no determined blood of a deceased Osage testatrix of one-half Osage Indian blood to whom such testatrix had devised a portion of her property of but "negligible value" to take under the provisions of 84 Okla. Stat. 44 a share of his wife's estate measured by 84 Okla. Stat. 213, the Oklahoma statute of descent and distribution.

The headnote of *Soderstrom* outlines the facts, law and basis for the holding of the Court, as follows:

> "Testamentary disposition by competent adult Osage Indian held governed by Oklahoma law prohibiting spouse from bequeathing away from surviving spouse so much of estate that surviving spouse would receive less in value than through succession by law, notwithstanding testatrix executed will and died in New Mexico, where she was residing and where she owned personal property, where estate disposed of by will included real estate in Osage County, interest in Osage Indian headrights, and money to testatrix' credit, as restricted Osage Indian, in Treasury of United States (Act Cong. April 18, 1912, § 8, 37 Stat. 88; 84 Okl. St. Ann. §§ 44, 213, St. 1931, §§ 1539, 1617)."

while the syllabus by the Court recites the rule of the case as follows:

> "An adult member of the Osage Tribe of Indians not mentally incompetent, in the disposition of his property, is bound by the general laws pertaining to wills in Oklahoma, and the disposition to those members of his family or relatives which is provided in said laws. Act Cong. April 18, 1912, § 8, 37 Stat. 88; Sections 1539, 1617, O.S. 1931 (84 Okl. St. Ann. §§ 44, 213)."

Revard, supra, and *Soderstrom, supra,* were followed by *In re Mo-se-che-he's Estate* (Okla. 1940), 107 P.2d 999, the third of the Oklahoma cases to construe the Act of 1912. The first headnote of the latter case combines law, fact and holding, by saying:

> "An adult member of the Osage Tribe of Indians in disposing of any or all of his or her estate by will under congressional act, must do so, in accordance with the laws of the State of Oklahoma pertaining to wills, and hence will of unmarried Indian woman was revoked by her subsequent marriage, under Oklahoma statute providing that a will executed by an unmarried woman is revoked by a subsequent marriage. Act Cong. April 18, 1912, § 8, 37 Stat. 88; 84 Okl. St. Ann. § 108."

In its arguments the Government implies that Mo-se-che-he held the Act of 1925 applicable to cases involving wills. However, Fierro, the husband of Mo-se-che-he, was held entitled, without proof of blood, to contest the will and to obtain a decree finding Mo-se-che-he's will was revoked by her marriage to him because such will had been executed prior to her marriage to him and while she was unmarried and because the laws of the State of Oklahoma then provided by 84 Okla. Stat. 108 that a will executed by an unmarried woman was revoked by her subsequent marriage.

Soderstrom has been the law in the State of Oklahoma since the date of its rendition in 1937, twelve years after the passage of the 1925 Act. 84 Okla. Stat. 44 does not pertain to inheritance, for inheritance occurs only in the case of intestacy, which is the antithesis of testacy. Its provisions express a philosophy of the law of wills under which the aggrieved spouse takes by force of law and not by inheritance and hence the 1925 Act is not applicable.

Soderstrom has remained in effect, unchallenged for 37 years except for the decision of the lower court. Its rule has thus become a rule of property and should not be disturbed by the federal courts even though they might reach a different conclusion if the question were an open one. *Dunn* v. *Micco*, 106 F.2d 356, *cert. den.* Dec. 11, 1939; *U. S.* v. *Title Ins. Co.*, 265 U.S. 472, 486, 44 S.Ct. 621, 623, 68 L.Ed. 1110; *Minnesota Min. Co.* v. *National Min. Co.*, 18 L.Ed. 42.

C. IF THE DECISION TO BE MADE IN THIS CASE IS TO BE RULED BY A PRIOR DECISION OF THIS COURT OR AFFECTED THEREBY SUCH PRIOR DECISION IS BLUNDELL v. WALLACE, 267 U.S. 664, WHICH DISTINGUISHES THE DECISION MADE BY THIS COURT IN BLANSET v. CARDIN, 256 U.S. 319, WHICH LATTER OPINION HAS BEEN RELIED UPON BY THE GOVERNMENT THROUGHOUT THE SEVERAL STAGES OF THIS CASE.

The Government and Intervenors have successfully argued that the Act of 1925 should apply to this case because of the opinion of this Court entered in *Blanset* v. *Cardin, supra.*

Blanset and *Blundell* both arose from Oklahoma.

Blanset concerned a federal act pertaining to the Quapaw Tribe which follows the language outline of the Osage Act of 1912 but which is decisionally dissimilar thereto, the Quapaw Act reading in pertinent part:

> "That any person of the age of twenty-one years . . . shall have the right . . . to dispose of such property (restricted), *in accordance with regulations to be prescribed by the Secretary of the Interior:* Provided . . . That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of Interior. . . ." (Emphasis supplied.)

The total decisional dissimilarity between the Quapaw Act and the Osage Act appears upon consideration of the language of the Quapaw Act granting to the Quapaw testator the right to dispose of his restricted property:

> ". . . in accordance with regulations to be prescribed by the Secretary of the Interior. . . "

and the Osage Act granting to the Osage testator the right to dispose of his restricted property:

> ". . . in accordance with the laws of the State of Oklahoma. . . ."

Blundell, however, involved a Five Civilized Tribes Act structurally dissimilar but decisionally analogous to the Osage Act. This appears from the sole headnote of *Blundell* which reads that:

> "In view of the existing restriction upon alienation of Indian lands, § 23 . . . allowing testamentary disposition of property but providing that no will of a full-blood Indian devising real estate shall be valid if it

disinherits parent, spouse, or children, unless duly acknowledged, merely removed such existing restrictions and left Indian *wills subject to the provisions of the laws of the state where the Indians were situated;* and therefore, an Indian woman could not will more than two-thirds of her property away from her husband, if the state law forbade it." (Emphasis supplied.)

Since *Blundell* dealt with a case arising from Oklahoma where the Federal Act involved left the Indian wills:

". . . subject to the provisions of the laws of the state where the Indians were situated. . . ."

and since the Osage Testate Act of 1912 granted to the Osage testator the right to dispose of his restricted property:

". . . in accordance with the laws of the State of Oklahoma. . . ."

the similarity of the present case to *Blundell* and its dissimilarity to *Blanset* should not require further emphasis.

That the *Blundell* Court would not permit *Blanset* to govern this case appears from the following language of the *Blundell* Court:

". . . The effect of § 23 was to remove a restriction theretofore existing upon the testamentary power of the Indians, leaving the regulatory local law free to operate as in the case of other persons and property. There is nothing in Blanset v. Cardin, 256 U.S. 319, 65 L ed 950, 41 Sup Ct Rep 519, cited to the contrary which militates against this view. That case involved the will of a Quapaw woman, devising her restricted lands away from her husband. . . . But the act there considered was very different from the one now under review. *There the authority to dispose of restricted*

property by will was limited by the provisions of the Act of February 14, 1913, Chap. 55, 37 Stat. at L. 678, Comp. Stat. 4338, 3 Fed. Stat. Anno. 2d 3d p. 855, that the will must be 'in accordance with regulation to be prescribed by the Secretary of the Interior,' and that no will 'shall be valid or have any force or effect unless and until it shall have been approved by that officer.' By this language the intent of Congress to exclude the local law and to establish the regulations of the Secretary as alone controlling was made evident; and it was so held. *But here the Federal statute contains no provision of like character; it is without qualification except in the single particular set forth in the proviso; and, clearly, it does not stand in the way of the operation of the local law."* (Emphasis supplied.)

Petitioner thus asks this Court to declare that 84 Okla. Stat. 44 applies to Osage wills with the same force as it applies to the wills of other citizens of the State of Oklahoma and asks the Court to hold that the Act of 1925 has no effect upon the application of 84 Okla. Stat. 44 to such wills, for here the Federal statute relative to testacy provides that Oklahoma law shall govern the devolution of the property of deceased Osage testators and is without qualification except in the single particular set forth in the proviso which was satisfied by the approval of the will by the Secretary, and thus does not stand in the way of the operation of the local law.

D. PETITIONER IS ENTITLED TO A REHEARING.

Petitioner abandons none of her previous contentions.

The Acts of 1912 and 1925 mock the Constitution, rob the State of Oklahoma of its plenary powers and rape Petitioner of her civil rights, all in the name of race, nothing more.

This case *was* decided at the District Court level by a Magistrate rather than by a Judge and Petitioner *was* denied an administrative appeal by the lower courts and the findings of the Trial Examiner *were* ignored, *etc.*

So certain that this Court would accept jurisdiction and right the wrongs done Petitioner, Counsel for Petitioner adumbrated rather than drove home the issue brought to this Court's attention by means of this petition. Moreover, her counsel indicated rather than expressed the point that *Soderstrom* established a rule of property and that for such reason *Soderstrom* should be permitted to stand whether or not this Court would have reached a contrary view had the question been an open one.

While *Erie Railroad* v. *Tomkins* is based upon diversity of citizenship there is even more reason for a holding in the instant case that this Court is bound by *Soderstrom* than would exist in an ordinary diversity case, for here the Congress committed the devolution of the property of the deceased Osage Indian testators to Oklahoma law and not to the judgment of the federal courts.

Moreover, in *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, an exemplar cited by this Court in respect to the second ground for motion for rehearing provided by

Paragraph Two of Rule 58 of this Court, a case involving an automobile patent, this Court initially denied certiorari for lack of conflict but subsequently granted certiorari upon a showing that litigation elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the sixth circuit. Since Congress has vested Oklahoma courts with exclusive venue and jurisdiction to determine the devolution of estates of deceased Osage testators, the reasoning applied in *Schriber-Schroth* applies with even greater force to this case.

It is surprising to a novice, even an ignorant one such as is counsel, to find the federal courts overturning the decisions of the State of Oklahoma pertaining to the laws of the State of Oklahoma and holding contrary thereto and contrary to the view of the leading textwriter upon the subject, especially since 37 years have passed since the *Soderstrom* opinion was written, with but two opinions, those of the two lower courts, being entered in opposition to it.

CONCLUSION

By its passage of Section 8 of the Act of Congress of 1912, *supra*, concerning the testamentary disposition of property by restricted Osage Indians and the testamentary disposition of restricted property by competent Osage Indians, the Congress adopted as the exclusive method to be employed in the testate devolution of such property of such Indians the law of wills of the State of Oklahoma, a part of which is 84 Okla. Stat. 44. Such section of such Act is broadly written, is in terms applicable to restricted lands and personalty and enables the Indian to dispose of any and all of his estate by will, in accordance with such state law, if his will be first approved by the Secretary of the Interior. Such section of such act is exclusive and relates solely and exclusively to testacy and is without qualification as to the operation of Oklahoma law except in the single particular set forth in the proviso, which proviso does not stand here, in the way of the operation of the local law.

Thus, a competent Osage Indian may dispose of his Osage headright by will, but in doing so he is bound by the laws of the State of Oklahoma pertaining to the disposition of his property to those members of his family or relatives, or the intentional omission thereof, which are set up in said laws of such state the provisions of which are engrafted upon his will.

Thus, the surviving spouse of a deceased Osage Indian testator takes by force of 84 Okla. Stat. 44, rather than by inheritance, a share of her deceased husband's estate measured by rather than by means of the Oklahoma statute

of succession, 84 Okla. Stat. 213, which, by its terms, is applicable only in cases of intestacy. It follows that the proscription of the Act of 1925 does not apply to such surviving spouse whatever her racial origin.

It follows that the restrictions placed by Oklahoma law upon a testator as to the disinheritance of his spouse and his children apply to an Osage will with the same force and effect as to any other citizen of the State of Oklahoma and this is the meaning of this Court in *Blundell, supra*, and that of the Oklahoma Supreme Court in *Soderstrom, supra*.

Respectfully submitted,

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June, 1974

CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay, and that on June 5, 1974, I mailed three copies of the foregoing petition for rehearing to Kelly & Gambill, Pawhuska, Oklahoma, and three copies to Kane & Kane, Pawhuska, Oklahoma, Attorneys for the Intervenors, and that I mailed three copies with first class postage prepaid to the U. S. District Attorney, Federal Building, Tulsa, Oklahoma, who represented the United States in the U. S. District Court, Northern District, Oklahoma; and mailed three copies with airmail postage prepaid to Terrence L. O'Brien, Attorney, Department of Justice, Washington, D. C. 20530.

Shockley T. Shoemake